UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA, et al.,	***)***	
Plaintiffs	***)***	
v.	***)***	***Docket No. 00-8-P-DMC***
YORK OBSTETRICS & GYNECOLOGY, P.A.,	***)***	
Defendant	***)***	

MEMORANDUM DECISION AND ORDER GRANTING INJUNCTIVE RELIEF[1]

Trial was held in this case over five days between November 7 and November 14, 2000. The jury returned a verdict in favor of plaintiff-intervenor Raymond McLaren on the count of the complaint that alleged violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*., and in favor of the defendant on all other counts. The jury awarded Mr. McLaren $60,000 in damages pursuant to 42 U.S.C. § 12188(b)(2)(B). The government indicated at that time, consistent with the request for relief contained in its complaint, that it also seeks injunctive relief and imposition of a civil penalty pursuant to 42 U.S.C. § 12188(b)(2). After passage of a period of time requested by the parties for negotiation, I directed them to submit simultaneous memoranda of law and replies on the outstanding issues. They have now done so, and this matter is in order for entry of final judgment.

The statutory language at issue provides:

[1] Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all (*continued on next page*)

[1] **(B) Potential violation**

If the Attorney General has reasonable cause to believe that —

(i) any person or group of persons is engaged in a pattern or practice of discrimination under this chapter; or
(ii) any person or group of persons has been discriminated against under this subchapter and such discrimination raises an issue of general public importance,

the Attorney General may commence a civil action in any appropriate United States district court.

(2) Authority of court

In a civil action under paragraph (1)(B), the court —

(A) may grant any equitable relief that such court considers to be appropriate, including, to the extent required by this subchapter —
(i) granting temporary, preliminary, or permanent relief;
(ii) providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and
(iii) making facilities readily accessible to and usable by individuals with disabilities;

(B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount —
(i) not exceeding $50,000 for a first violation; and
(ii) not exceeding $100,000 for any subsequent violation.

* * *

(5) Judicial consideration

In a civil action under paragraph (1)(B), the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this chapter by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid

proceedings in this case, including trial, and to order entry of judgment.

> needed to accommodate the unique needs of a particular individual with a disability.

42 U.S.C. § 12188(b)(1)(B), (b)(2) & (b)(5).[2] The government seeks imposition of an unspecified but "substantial" civil penalty both "to reimburse the U. S. Department of Justice" and to serve as a deterrent to the defendant and others, Government Memorandum at 7, 8, and entry of a specific order of injunctive relief, *id*. Exh. 2.[3] The defendant opposes any monetary penalty and has submitted its own proposed order of injunctive relief. Defendant York Obstetrics' Opposition to Plaintiff Raymond McLaren's Motion [sic] for Assessment of a Civil Penalty Pursuant to 42 U.S.C. § 12188 and for Injunctive Relief ("Defendant's Memorandum") (Docket No. 100), Exh. D.

There is apparently no reported case law applying the penalty provisions of the ADA that are at issue here. The government cites extensively to case law construing civil penalty provisions of other federal statutes, but such statutes are often written in language that is significantly different from that of section 12188(b)(2).

In this case, the violations of the ADA found by the jury consist of the failure to provide Raymond McLaren with a sign language interpreter upon his request on four to six occasions when he accompanied his wife to the defendant obstetrical practice for pre-natal visits.[4] The scope of the

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[2] The government reports that the maximum civil penalty available under section 12188(b)(2)(C)(i) was increased to $55,000 by the Federal Civil Monetary Penalties Inflation Adjustment Act of 1999, Post Trial Memorandum of the United States of America ("Government's Memorandum") (Docket No. 98) at 4 n.4, while neglecting to mention that this increase is only applicable to violations that occur after September 29, 1999, 28 C.F.R. § 36.504(a)(3)(i). Any possible violations of the requirements of the ADA with respect to Mr. McLaren by the defendant occurred well before September 29, 1999.

[3] It is also important to note, notwithstanding the government's suggestion that the court "must" impose such a penalty, *see, e.g.*, Government Memorandum at [12]; Response of the United States of America to Defendant's Opposition to Request for a Civil Penalty and Injunctive Relief ("Government's Reply") (Docket No. 103) at 7, that the statute clearly provides that imposition of a civil penalty is a matter entirely within the court's discretion.

[4] The government contends that the court should consider the fact that the defendant "acknowledged during the course of the trial to having never provided the assistance of an interpreter to a series of other deaf patients" and its belief that "this defendant has disregarded the ADA rights of other persons who have disabilities." Government's Reply at 2, 7 n.14. There is no evidence in the record to support the latter contention and I accordingly will not consider it. With respect to the former contention, I have repeatedly ruled in this case that the defendant was not required by the ADA to provide a sign language interpreter solely because a hearing-impaired individual requested services from it, and I see no reason to depart from that position at this time. It is not possible, as a matter of law, to infer that the defendant violated the ADA merely because it provided services to other hearing-impaired individuals (*continued on next page*)

injunctive relief sought by the government under these circumstances is excessive. I will enter an order granting injunctive relief that is appropriate under all the circumstances.

With respect to the government's request for imposition of a civil penalty, I find that the amount of compensatory damages awarded by the jury under the circumstances can and will serve a public deterrent function. I would ordinarily conclude that these damages would also serve to deter the defendant from future violation of the ADA in similar circumstances, but I am troubled by the statements of the defendant's managing partner to the press after the trial emphasizing that Raymond McLaren "was not [its] patient" and was "not even our patient," Exhs. 6-8 to Government's Memorandum, suggesting that the defendant still does not accept the fact that its duties under the ADA extend to all individuals who can reasonably be expected to use its services in any way, 42 U.S.C. § 12182(a). The defendant made no objection to the jury instruction setting forth its duty to Raymond McLaren under the ADA. While it may disagree with the jury's verdict and its decision to credit Mr. McLaren's testimony that he repeatedly requested an interpreter over the testimony offered by the defendant that he did not do so, the defendant should not continue to believe that it had no duty to Mr. McLaren under the ADA.

The government has submitted in connection with its advocacy of a substantial civil penalty to "reimburse" the government the affidavits of Martha A. Barron and James M. Moore. Exhs. 3 & 4 to Government's Memorandum. Mr. Moore represented the government at trial. Ms. Barron states that the Office of the United States Attorney "has incurred $38,819.71 in expenses" associated with this case and that "[m]ost of the expenses incurred in this case were for payment of expert witness fees, sign language interpretation, deposition transcripts, private investigation and travel." Declaration of Martha A. Barron, Exh. 3 to Government's Memorandum, ¶ 4. Mr. Moore states that "the U.S.

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without automatically providing them with the specific aid of sign language interpreters.

Department of Justice devoted in excess of 1,000 attorney hours to the investigation, discovery and motions states as well as the trial" of this case. Declaration of James M. Moore, Exh. 4 to Government's Memorandum, ¶ 6. Assuming without deciding that reimbursement of investigation costs is a purpose of the ADA's civil penalty provision which provides for the imposition of such a penalty "to vindicate the pubic interest," the government's submissions in this case do not support the imposition of any penalty for this purpose.

The Department of Justice itself has issued regulations implementing the ADA. One of those regulations significantly provides as follows:

> In any action or administrative proceeding commenced pursuant to the Act or this part, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable to the foregoing the same as a private individual.

28 C.F.R. § 36.505. Surely the government may not recoup indirectly, via the imposition of a civil penalty, that which it may not recover directly by virtue of its own regulation. Attorney fees (or the equivalent value of attorney time), litigation expenses and costs may not be recovered in this manner. So far as appears from the Barron affidavit, all of the asserted expenses incurred are those traditionally incurred in connection with litigation; many of the individual items listed are treated as litigation costs under Fed. R. Civ. P. 54. The remedial purpose of other federal statutory civil penalty provisions is directed to the regulatory function of the agencies that regulate the businesses or subject matter at issue. *See, e.g.*, 19 U.S.C. § 1592 (civil penalties for failure to pay customs duty); 29 U.S.C. § 216(c) (civil penalties for child labor violations); 30 U.S.C. § 820(a) (civil penalties for mine safety violations); 42 U.S.C. § 7413(b) (civil penalties for violation of Clean Air Act). Those investigatory costs are quite different from the costs identified in the Barron affidavit here.

While I see no evidence of any good faith effort by the defendant to comply with the ADA with respect to Raymond McLaren in this case, I do not reach consideration of section 12188(b)(5) because I conclude, albeit with some reluctance given the post-trial statements of the defendant's managing partner, that the imposition of a civil penalty is not appropriate under the circumstances.

In addition to the damages awarded to Raymond McLaren by the jury, the judgment in this case shall include the following injunctive relief:

1. York Obstetrics & Gynecology, P.A., and its officers, physicians, employees and agents (hereafter "York Obstetrics"), are hereby enjoined from violating the Americans with Disabilities Act (hereafter "ADA") or otherwise discriminating on the basis of hearing impairment or any other disability against any individual with a disability who seeks any service from them.

2. York Obstetrics shall furnish all appropriate auxiliary aids and services, at no cost, to persons who are deaf or hearing-impaired, including, but not limited to, qualified sign language and oral interpreters, when necessary for effective communication.[5]

3. York Obstetrics shall produce a written policy for effective communication that will ensure compliance with Title III of the ADA. The written policy shall include the following provisions: (i) for deaf and hearing-impaired patients, York Obstetrics will affirmatively offer and, if

[5] "Effective communication" exists when there is sufficient communication to provide the disabled individual with the same level of services received by patients and their companions who are not disabled due to a hearing impairment.

accepted, provide at no charge to the patient, auxiliary aids and services, including qualified sign language interpreters, to assist the patient in communicating concerning treatment decisions, needs, conditions, history or symptoms, or to act on information, advice or instructions offered by York Obstetrics personnel, to the extent auxiliary aids and services are necessary to ensure effective communication, and so note each such offer and accommodation in the patient's chart; and (ii) whenever a patient, whether or not deaf or hearing-impaired, is accompanied by an individual who is authorized by the patient to communicate with York Obstetrics personnel about the patient; participate in any treatment decision; play a role in communicating the patient's needs, condition, history or symptoms; or help the patient act on the information, advice or instructions provided by York Obstetrics personnel, York Obstetrics will affirmatively offer and, if accepted, provide at no charge to any such person who is deaf or hearing-impaired those auxiliary aids and services, including qualified sign language interpreters, that are required hereby to be offered to a patient under the circumstances and shall so note in the patient's chart.

4. York Obstetrics shall distribute copies of its written policy to all personnel at any of its offices who have contact with members of the public, including York Hospital birthing nurses.

5. York Obstetrics shall develop and implement an appropriate training program to ensure that all personnel (including, but not limited to, York Hospital birthing nurses) who have contact with patients who are deaf or hearing-impaired as well as other deaf or hearing-impaired persons associated with its patients, are sensitive to the communication needs of such persons and knowledgeable about York Obstetrics' written policy described in paragraph 3 hereof.

6. York Obstetrics shall post signage of conspicuous size and print at a prominent place in each of its waiting rooms and scheduling areas stating: "York Women's Care Associates recognizes its legal obligations to ensure effective communication with persons who are deaf or hearing impaired.

Sign language interpreters and other auxiliary aids and services are available to provide equal access to our staff and services for deaf and hearing-impaired persons. Please contact any member of our staff for further information or to request this service."

7. York Obstetrics shall certify to this court and to the office of the United States Attorney that it has complied with paragraphs 3-6 above within sixty days from the entry of this order.

Dated this 30th day of January 2001.

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David M. Cohen
United States Magistrate Judge

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v.	
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